

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re Bermudez*, Minors.

UNPUBLISHED

March 19, 2015

No. 323864

Cass Circuit Court

Family Division

LC No. 13-000036-NA

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Before: BOONSTRA, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Respondent-mother, M. Herrera, appeals as of right the trial court's order terminating her parental rights to her four minor children. We affirm.

I. FACTS

On March 13, 2013, the Department of Human Services (the Department) petitioned to take the children into protective custody. The Department alleged that Herrera's youngest child was in the hospital in critical condition. The child was bruised, scratched, and suffered from bleeding in his brain. The child's doctor told the Department that it was a "clear case of 'shaken baby syndrome.'" The trial court ordered the children removed from Herrera's home.

On March 14, 2013, the trial court held a preliminary hearing. At the hearing, Herrera indicated that she was not sure whether she could afford an attorney, and she requested that the trial court appoint an attorney for her. The trial court indicated that it would adjourn the hearing and the parties would return to court with their attorneys on March 26, 2013. However, the trial court then determined that it would hear testimony about the petition.

Julie Pond, a Children's Protective Services Worker, testified that she filed the emergency removal petition because the emergency room at the Lakeland Hospital contacted Children's Protective Services. According to Pond, the child had a variety of symptoms consistent with nonaccidental injuries, including bruises in various stages of healing, head trauma, dilated eyes, and vomiting. Dr. Philpot said that the child was also in the emergency room on January 29, 2013 for head trauma. Herrera indicated that she worked three days a week and left the child with her mother-in-law. Pond opined that the child's bruises, scratches, and injuries were not consistent with Herrera's explanations. Pond testified that the child's ophthalmologist at Bronson Hospital "stated that this was a clear case of shaken baby syndrome."

The trial court gave Herrera the opportunity to ask Pond any questions, but Herrera indicated that she did not have questions. The trial court found that the Department had established probable cause that one or more of the allegations in the petition were true and that it was contrary to the children's welfare to be placed with Herrera. The trial court authorized the petition and placed the children with the Department. The trial court's March 14, 2013 order reflects that it authorized the petition and found that returning the children to Herrera's home would be contrary to their welfare.

Herrera appeared with counsel at the March 26, 2014 preliminary hearing. At the hearing, counsel indicated that Herrera intended to waive the preliminary hearing. The trial court found that all parties waived its probable cause determination. In its order following the March 26, 2014 hearing, the trial court indicated that there was probable cause to believe that the allegations in the petition were true and that it made findings regarding the children's welfare in a previous order.

Herrera later pleaded no contest to the allegations in the petition. At the plea hearing, Pond's testimony was consistent with her preliminary hearing testimony. The trial court assumed jurisdiction over the children, and Herrera later released her parental rights.

## II. RIGHT TO COUNSEL

Herrera asserts that the trial court deprived her of her right to due process when it conducted the preliminary hearing before appointing an attorney for her. We agree that the trial court plainly erred when it conducted the preliminary hearing before Herrera's counsel was present, but we conclude that the error does not warrant reversal.

Generally, this Court reviews de novo questions of constitutional law, including whether the trial court's proceedings protected the parent's rights to procedural due process. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2013); *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). But if a party does not raise his or her constitutional challenge in the trial court, it is not preserved. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). This Court reviews unpreserved claims of constitutional error for plain error. *Williams*, 286 Mich App at 274. An error is plain if it is clear or obvious, and the error affected a party's substantial rights if it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A parent has a fundamental liberty interest in the care and custody of his or her children under the Fourteenth Amendment of the United States Constitution. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *Reist v Bay Co Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976). Accordingly, "the Due Process Clause requires assignment of counsel at public expense for an indigent for hearings when the state seeks to terminate his [or her] parental rights." *Reist*, 396 Mich at 346. See *Williams*, 286 Mich App at 275-276.

At the preliminary hearing, "the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial." MCR 3.965(B)(11). The standard to determine whether the children come within the provisions of the juvenile code at the preliminary hearing is probable

cause. MCR 3.965(B)(11). The trial court may adjourn a preliminary hearing “for the purpose of securing the appearance of an attorney . . . .” MCR 3.965(B)(1).

The court shall appoint an attorney to represent the respondent at any hearing, *including the preliminary hearing*, conducted pursuant to these rules if

(i) the respondent requests appointment of an attorney, and

(ii) it appears to the court, following an examination of the record . . . that the respondent is financially unable to retain an attorney. [MCR 3.915(B)(1)(b) (emphasis added).]

The trial court should advise parents of their rights to counsel at the outset of the preliminary hearing and should not continue a preliminary hearing after a party has requested counsel. *In re Jones*, 137 Mich App 152, 156-158; 357 NW2d 840 (1984).

The trial court plainly erred when it continued the preliminary hearing after Herrera requested counsel. The mandatory word “shall” in MCR 3.915(B)(1)(b) indicated that the trial court was required to appoint counsel to assist Herrera at the preliminary hearing, and MCR 3.965(B)(1) allowed the trial court to adjourn the preliminary hearing so that Herrera could secure counsel. The trial court ascertained that Herrera wanted counsel but, inexplicably, it continued the preliminary hearing even though Herrera was not assisted by counsel. Counsel was not available to assist Herrera to cross-examine Pond or present any contrary evidence before the trial court made its findings regarding the petition. We conclude that the trial court plainly erred when it continued the proceeding because its decision was contrary to MCR 3.915(B)(1)(b) and deprived Herrera of due process.

However, we conclude that this error does not warrant reversal because it did not affect Herrera’s substantial rights. *Carines*, 460 Mich at 763. A waiver is an intentional abandonment or relinquishment of a known right. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). A party’s waiver forfeits appellate review of a claimed deprivation of a right. *Id.*

In this case, Herrera appeared at the March 26, 2013 hearing with counsel. Counsel expressly waived the preliminary hearing. Given counsel’s waiver, Herrera cannot show that the outcome of the proceeding would have been different had counsel represented her at the initial preliminary hearing. Accordingly, Herrera has not demonstrated clear error. Further, the trial court’s error was harmless for the same reason. See *In re BKD*, 246 Mich App 212, 219; 631 NW2d 353 (2001) (holding that an error is harmless if it did not affect the outcome of the case).

We affirm.

/s/ Mark T. Boonstra  
/s/ David H. Sawyer  
/s/ Peter D. O’Connell